United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7677, 7681

United States Court of Appeals

FOR THE SECOND CIRCUIT

RANDOLPH PHILLIPS,

Plaintiff-Appellee,

v.

JOHN E. TOBIN, FRED M. KIRBY, ALLAN P. KIRBY, JR., each in their own capacity as directors of Alleghany Corporation, and as attorneys for and guardians of the property of Allan P. Kirby, Sr., JOHN J. BURNS, JR.,

Defendants-Appellants.

RALPH K. GOTTSHALL, RICHARD R. HOUGH, WILLIAM G. RABE, CLIFFORD H. RAMSDELL, and CARLOS J. ROUTH, as directors of Alleghany Corporation,

Defendants,

and ALLEGHANY CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE RANDOLPH PHILLIPS.

RANDOLPH PHILLIPS
30 East 72nd Street
New York, New York 10021
Plaintiff-Appellee Pro se
(212) 734-6776

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other authorities

BRIEF OF APPELLEE RANDOLPH PHILLIPS

The ruling appealed from

"Defendants raise a variety of challenges to Phillips' fitness to maintain this suit pro se under the strictures of Rule 23.1, Fed. R. Civ. P. These arguments ... have been examined by the Court and are rejected." (J. A. 208a)

Judge Ward's denial of defendants' motions for judgment on the pleadings dismissing Counts I, III, and VII and which seek recovery of $6 to $8 million in damages for Alleghany Corporation.

As stated in Judge Ward's Opinion:

> "Phillips, the beneficial owner of shares of Alleghany's common stock, charges violations of the... federal securities laws, and the common law fiduciary duties of defendant directors. The violations are alleged to have taken place in the course of Alleghany's 1968 acquisition of the Jones Motor Company, Inc. ('Jones')....(J. A. 197a)
>
> ***
>
> "In Count III and also in Count I, the Jones transaction and certain alleged omissions in a proxy statement are challenged as violative of the anti-fraud provisions of the Securities Exchange Act of 1934. It is not contended that ICC regulation

exempts Alleghany from the reach of the anti-fraud provisions of the federal securities law.

Phillips charges in Count III violations of Rule 10b-5 promulgated under the Securities Exchange Act of 1934 (15 U. S. C. s 78a, and SEC proxy rule 14a-9 arising from the Jones acquisition. His claim that the price paid for the motor company was exorbitant presents a fact question and adjudication of the issue at this juncture would be impermissible. Although the challenged proxy solicitation related to authorization for Alleghany to withdraw its SEC registration and to amend its charter to do business as a motor carrier rather than to approval of the Jones purchase itself, the connection between the assents sought and the acquisition is not so attenuated as to bar a 10b-5 action as a matter of law.

Since the claim arose in 1970 when ICC approval was secured, it is not time-barred." (J. A. 204a-205a)

* * * *

Defendants' motion to dismiss the proxy fraud claim alleged in Count I, the derivative 10b-5 cause of action contained in Count III, and the Count VII state claims which arise from the Jones transaction is denied." (J. A. 208a)

The relevant provision of Rule 23.1

" * * * The derivative action my not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders ... similarly situated in enforcing the right of the corporation ..."

I.

JUDGE WARD IN HIS SUPERVISORY CAPACITY UNDER RULE 23,1 CORRECTLY REJECTED APPELLANTS' ARGUMENTS THAT PHILLIPS WAS NOT A FAIR AND ADEQUATE REPRESENTATIVE OF THE ALLEGHANY SHAREHOLDERS

A. The record establishes that Phillips is the most successful Alleghany shareholder representative in more than 20 years of litigation.

In 1956 Philips defeated Henry J. Friendly, Esq. and other distinguished attorneys before the S. E. C. (In re Alleghany Corporation, 37 S. E. C. 424). This was an application on behalf of preferred stockholders for issuance of some $17 million of new stock, the effect of which was to dilute severely the common's equity. Phillips defeated the application by a 4 to 1 vote of the S. E. C.

In the complex of litigation from 1954 to 1965 that resulted in the payment of a $1,250,000 fee to "the Graubard-Brussel-Phillips group" (Zenn v. Anzalone, 46 Misc. 2d 378), * Phillips was "one of the activists in the entire litigation" and the architect of the settlement that brought $3,000,000 in cash into Alleghany's treasury (compared with the $700,000

* The settlement background is set forth in Alleghany Corp. v. Kirby, 218 F. Supp. 134, aff'd 333 F. 2d 327 (2d Cir. 1964)

that Abraham L. Pomerantz, Esq. was prepared to settle the Alleghany shareholders' derivative claims for, and which compelled the Murchison Brothers of Dallas, Texas to return to Alleghany the controlling shares of the then $3 billion (now $9 billion) Investors Diversified Services, Inc. system of investment companies.

> "Mr. Phillips can take credit for forcing Alleghany's controlling stockholders and several of their supporters to pay Alleghany $3,000,000 in cash from their own pockets and return to the company 's treasury 24 percent of the voting stock of a $3,000,000,000 investment complex in exchange for a similar amount of non-voting stock. The voting power attached to this deal has been estimated in Wall Street circles to be worth more than $10,000,000." THE NEW YORK TIMES, SUNDAY, JANUARY 10, 1960, Section 3, p. 3.

When the Murchison Brothers sought to upset the settlement, charging it had been achieved by "fraud" between Kirby and Phillips, Phillips defended himself pro se and the charges were dismissed as "utterly without merit" (Alleghany Corporation v. Kirby, 218 F. Supp. 164 (S. D. N. Y. 1963). Thus the settlement was preserved and the Murchisons failed to regain control of the $3 billion I. D. S. system, not to mention return of their chare of the $3,000,000 cash settlement.

In the magnitude of assets affected the return of control of the $3 billion I. D. S. system is the largest settlement in the history of derivative suits and clearly establishes the fairness and adequacy of Phillips acting as a representative plaintiff pro se.

Finally, the present record establishes Phillips' fairness and adequacy as a representative of the Alleghany shareholders in this case, since he defeated the motions of two of the largest

Establishment law firms - the Cahill and De' evoise firms each employing more than 100 lawyers - for an order dismissing the amended complaint or for judgment on the pleadings. Phillips thereby preserved for the Alleghany shareholders claims with a potential recovery value of $6 to $8 million. He achieved this victory despite the fact that 7 lawyers were on the briefs for the two law firms. What greater test of fairness and adequacy can there be for a single pro se plaintiff than that he defeats no less than 7 licensed members of the bar?

B. At least 23 Judges of the Supreme Court of the United States, the Second, Third and Fourth Circuit Courts of Appeals, the District Courts for the Southern District of New York, the District of Maryland and of Delaware, have voted to sustain the legal positions asserted by Phillips as a party and attorney pro se in stockholder and civil rights litigation where he appeared in a representative capacity or on behalf of the public interest.

The following are some - but not all - of the decisions constituting Phillips' unique record both as plaintiff and defendant pro se:

Alleghany Corporation v. Breswick & Co. and Randolph Phillips, 353 U. S. 151 - Chief Justice Warren, and Justices Black and Douglas (dissenting)

In re Baltimore & Ohio Railroad Co., unreported fee decision, Bankruptcy Docket 9905, filed July 27, 1946 - Circuit Judges Soper & Dobie, District Judge Chesnut.

In re The United Corporation, 249 F. 2d 168 (3 Cir. 1954) - Circuit Judges Kalodner, McLoughlin & Maris.

Willheim v. Murchison, 312 F. 2d 399 (2d Cir. 1963) - Circuit Judges Clark, Kaufman & Hays.

Breswick & Co. and Randolph Phillips v. United States, 138 F. Supp. 123 - Circuit Judge Frank, District Judges Dimock & Walsh.

Phillips v. Murchison, 383 F. 2d 370 (2d Cir. 1969) Circuit Judges Waterman & Feinberg, Judge Moore dissenting. Subsequent unreported decision, Judge Metzner (61 Civ. 713)

Alleghany Corporation v. Allan P. Kirby, Randolph Phillips et al., 218 F. Supp. 164 - District Judge Dawson.

Phillips v. Rockefeller, 292 F. Supp. 851, - 3 Judge Court, District Judge Frankel dissenting, aff'd 393 U. S. 405.

United States of America v. The National Committee for Impeachment; Randolph Phillips, Chairman, 469 F. 2d 1135 (2d Cir. 1972) = Circuit Judges Hays, Timbers & Oakes. *

(Affidavit of Randolph Phillips, affirmed to March 5, 1975; Record Document 8)

* This list is not exhaustive. Nor does it include State Court Judges or decisions by administrative agencies.

C. Phillips' success in at least 5 cases in which Alleghany was a party clearly rebut its charges that he is an inadequate representative.

Phillips won (1) Breswick & Co. and Randolph Phillips v. United States and Alleghany Corporation, 134 F. Supp. 132; 138 F. Supp. 123 *; (2) In re Alleghany Corporation, 37 S. E. C. 424 **; (3) Breswick & Co. v. Briggs, 135 F. Supp. 397 ***; (4) Zenn v. Anzalone, 46 Misc. 2d 378 ****; and (5) Alleghany Corporation v. Kirby, 218 F. Supp. 164.

D. The Judges of the Second Circuit and New York State Supreme Court have commented favorably on Phillips' representation of stockholders.

The late Judge Dawson stated:

> "Phillips, with his customary degree of energy, did not allpw the unseaworthy condition of his ship (i. e., derivative action) to deter him from further activities. In the Fall of 1959 the case of Neisloss v. Arpaia, in which Phillips was a co-plaintiff was activated. Phillips also

* The Supreme Court reversed these decisions of the 3-judge District Court by a 5-3 vote (363 U. S. 151) but since a total of 6 Judges of the two courts voted for Phillips' position, the reversal is not an indication of inadequacy but the contrary.

** Henry J. Friendly, Esq. was Phillips' unsuccessful adversary.

*** This and Zenn were settled for $3 million and return of IDS control.

**** Phillips received a $408,000 fee.

threatened to sue Alleghany with respect to the legal fees Alleghany had paid to its counsel Lord, Day & Lord. Phillips also served a demand upon the corporation for a list of its stockholders. None of these activities was particularly comforting to the defendants." (218 F. Supp. at 175).

Mr. Justice McGivern stated in Zenn v. Anzalone, 46 Misc. 2d 378:

"Treating the major groups first, the court finds that fair and adequate compensation for the Graubard-Brussels-Phillips group should be $1,250,000 plus disbursements. * * * If a disproportion is seen between these latter groups and the Graubard contingent, the court averts to the avowed willingness of Alleghany to pay the Graubard group $1,000,000. Also, there is the fact that in the Graubard group is Randolph Phillips, one of the activists in the entire litigation..."

Judge Friendly commented in Phillips v. S.E.C., 388 F2d 964,

"It would be unprofitable to prolong this opinion by commenting on all the details that Phillips has ably presented; ..." (p. 972)

Public recognition of Phillips' ability was given by The New York Times of Sunday, January 10, 1960 in a profile of him in the financial section. Under his photograph The New York Times wrote:

"Randolph Phillips, whose carefully prepared lawsuits against corporations and agencies show mastery of corporate maneuver..."(p. 3)*

E. The fact that no less than 7 lawyers appear on defendants' briefs in opposition herein to plaintiff pro se is ample testimony of the adequacy of his representation.

* Vol. 32 of "Who's Who in America" carried a biography of Phillips in recognition of his representation of minority security holders.

The $613,000 in fees earned and damages recovered by Phillips

In the B&O case, supra, Phillips was awarded a fee of $5,000; In re United Corporation, supra, he was awarded $50,000 fee and $25,000 reimbursement of expenses; in the Alleghany complex of cases(Zenn, supra); he received a fee of $408,000 as plaintiff pro se and consultant to counsel; and in Phillips v. Murchison, supra, he received $150,000 in settlement. (Record Doc. 8)

II.

THE DISTRICT COURT CORRECTLY CONFIRMED THE RIGHT OF PHILLIPS TO ACT AS PLAINTIFF PRO SE IN PROSECUTING THE DERIVATIVE COUNTS OF THIS ACTION, SINCE THIS RIGHT IS GUARANTEED BY 28 U.S.C. § 1654.

This is the second time that the Debevoise law firm has unsuccessfully sought in the District Court to bar Phillips from acting pro se in a derivative action. The late Judge Dawson in Else Willheim and Randolph Phillips v. John D. Murchison et al., 206 F. Supp. 733 (S.D.N.Y. 1962), app. dismissed, 312 F. 2d 399 (2d Cir. 1963) stated

> "The right to conduct a case in the federal courts is governed by 28 U.S.C. s 1654 which reads as follows:
>
> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by

the rules of such courts, respectively, are permitted to manage and conduct causes therein."

" * * * The moving parties urge that this is not Phillips' own case, but a representative action brought on behalf of some other party, and therefore he cannot conduct it personally. Such contention misconceives the nature of a derivative stockholders action. Such an action is the action of a stockholder even though it may be brought for the benefit of the corporation.

"Once it is granted that Phillips is entitled to bring this derivative action as plaintiff, the case must, for purposes of Section 1654, be regarded as Phillips' own case. To hold that a representative action is not the case of the plaintiff bringing it is to confuse substance with procedure. For most if not all procedural purposes a derivative suit is considered to be the action of the nominal plaintiff. For example, for diversity purposes the corporation is treated as a party defendant and the nominal plaintiff as the actual plaintiff. Smith v. Sperling, 354 U. S. 91 (1956). See also, Reed v. Norman, 48 Cal. 2d 338, 309 P. 2d 809 (1957), where a stockholder was allowed to maintain a derivative action even though the corporation itself was disqualified from participating in litigation by reason of its failure to pay its franchise taxes.

"The argument of the defendants based on Section 1654 proves too much, since if a representative action is not to be regarded as the action of the plaintiff for purposes of this section then the section would not even cover appearances by counsel in such actions. Phillips' representation of the other stockholders results from the fact that he is permitted to bring this action as plaintiff and not from the fact that as plaintiff he chooses to appear in court for himself." (206 F. Supp. at 735-736) (Our emphasis)

Defendants-appellants have totally defaulted in confronting the rationale of this decision.

Ross v. Bernhard, 396 U. S. 531, confirms that the nature of a derivative action includes "the plaintiff's right to sue on behalf of the corporation." (534-535). Since the plaintiff has this "right" he also has the right under 28 U. S. C. 1654 to "plead and conduct (his) own case personally".

Two rights do not make a wrong. Yet that distortion of the case is exactly what Alleghany's brief seeks to impose upon this Court. Repeatedly it states that Phillips is acting as attorney for Alleghany, which he is not; he is simply enforcing as plaintiff "the plaintiff's right to sue on behalf of the corporation." Ross, supra. The right of the corporation to sue on its own behalf is unimpaired. And rather than acting here as Alleghany's attorney, the fact is notorious as shown by the cover of Alleghany's brief that the law firm of Cahill, Gordon & Reindel is appearing here as "Attorneys for Appellant Alleghany Corporation."

Phillips' "right" as "plaintiff...to sue on behalf of the corporation", as guaranteed by Ross, and his right under Section 1654 to "plead and conduct (his) own case personally" are beyond the power of Appellants to challenge.

Alleghany's contention that Phillips is not prosecuting "his" derivative suit but the corporation's is without merit on its face and a contradiction of the adversary procedure.

As the Supreme Court made clear in Ross v. Bernhard, 396 U. S. 531:

> "As elaborated in the cases, one precondition for the suit was a valid claim on which the corporation could have sued; another was that the corporation itself had refused to proceed after suitable demand, unless excused by extraordinary conditions. Thus the dual nature of the stockholder's action: First, the plaintiff's right to sue on behalf of the corporation and, second, the merits of the co. oration claim itself." (534-535) (Our emphasis)

Thus, according to Alleghany's logic a suit which it had "refused" to bring is Alleghany's suit ! And equally absurd is the formulation that Alleghany is the plaintiff, since it is the owner of the "substantive" right (Alleghany's brief, p. 11), and also an indispensable party defendant in order that it may be the beneficiary of any judgment for recovery. Alleghany is simply not aligned on the plaintiff's side of the case and if it were it would destroy the requisite adversary relationship by being aligned on both sides. Clearly, this derivative lawsuit is not Alleghany's "own case" within the meaning of Section 1654. Equally clear is the fact that it is "the plaintiff's right to sue on behalf of the corporation" (Ross, supra) that makes it Phillips' case.

None of Alleghany's case citations is in point

Appellant's entire thesis is that "the substantive right (which plaintiff seeks to enforce) is, of course, the corporation's" and "a corporation may not appear except through an attorney."* It then cites Niklaus v. Abel Construction Co., 164 Neb. 842, 83 N. W. 2d 904 (1957), and Otto v. Patterson, 173 Ohio State 174, 180 N. E. 2d 575, (1962). Neither of the proposed beneficiary municipal corporations, i. e. the city of Lincoln, Neb. and the city of Dayton, Ohio was a party to these actions and thus neither was represented by counsel. Thus the cases are not comparable to the present case, where Alleghany is a party defendant as the proposed beneficiar of the derivative action and is represented not by Phillips but by the law firm of Cahill, Gordon & Reindel. Since Alleghany is represented by counsel it can enforce its "substantive right' and thus its argument is not b na fide. Point I of its brief thus rests on a false foundation that Phillips is acting as attorney for the corporation when it is notorious that Cahill, Gordon & Reindel is the attorney for the corporation and Phillips is merely seeking to enforce, as permitted by the Supreme Court of the United States, "the plaintiff's right to sue on behalf of the corporation" in a deriv ative suit. Ross v. Bernhard, 396 U. S. at 534-535, and acting pro se as permitted by 28 U. S. C. 1654, when the corporation defaults in enforcing the claim.

* But, as Alleghany overlooks, the right to compel enforcement of the substantive right, when the corporation defaults, is the stockholder's. Ross v. Bernhard, supra.

Since Allleghany is a party defendant and it is not authorized at law or in equity to bring a derivative suit, it is an absurdity to state that a derivative suit is its "own case" within the meaning of Section 1654. But Alleghany could have made the subject matter of this derivative action the subject matter of its own suit if instead of refusing or failing to enforce the claims at issue it had sued directly as plaintiff to enforce the claims against the defendant directors. It chose not to or was in bondage so that it could not do so, being under the control of the defendants. It thus surrendered the role of party plaintiff or was disabled from assuming it and was forced into the role of party defendant. By accepting the latter role it has forfeited any possible claim that this derivative action is its case.*

---

* Alleghany's brief cites trustee and executor cases (p. 14) for the proposition that such persons may only litigate through attorneys. The reason is obvious, unlike stockholders they have no property rights of their own at issue. The derivative suit if successful results in an enhancement of the stockholders' equity. They are "the real, beneficial owners of the claims asserted in the suit" and thus within the scope of Section 1654. Heiskell v. Mozie, 82 F. 2d at 862. The stockholder's shares "give them that element of personal interest which alone permits the management of an action at law in a court by some one other than an attorney at law." Heiskell at 863. Alleghany would use this case for the proposition that only "the real party in interest", namely the corporation, has standing to sue under Section 1654. This would, of course, destroy the derivative action. Knowing full well that the corporation is "the real party in interest" vis-a-vis the defendants (obviously not vis-a-vis its stockholders) the Supreme Court has nevertheless repeatedly authorized derivative suits. E.g., Koster v. Lumberman's Mutual Cas. Co., 330 U. S. 518, 522-523; Ross v. Bernhard, supra.

Alleghany confuses the standards of Rule 23 with Rule 23.1

Alleghany's citations from the field of class actions are inapposite on their face, e.g., the 1974 Report of the Conference for District Court Judges, 64 F.R.D. 475, and Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975). These are not based on Rule 23.1 but on Rule 23, and state it "not permissible" for "a pro se plaintiff" or "layman" "to represent any person" in a class action. But this is not a class action; it is a derivative action in which, as stated by the Supreme Court in Ross v. Bernhard, supra, it is "the plaintiff's right to sue on behalf of the corporation" and in doing so the plaintiff has the option of prosecuting his suit pro se or retaining counsel, as provided by 28 U.S.C. 1654. In Oxendine and the Conference Report no issue arose under Section 1654, since the claims of other members of the class than plaintiff clearly were not the subject of the plaintiff's option under the section. In addition, these class actions under Rule 23 are not brought "on behalf of the corporation", as is the derivative action under Rule 23.1, and thus the corporation is not a mandatory party with mandatory appearance for it, as here, of a licensed attorney. Finally, the ruling in Oxendine is not applicable because it applies to an unqualified layman and not to somebody "learned in the law." Such learning is not a monopoly of the licensed lawyer.

The practice of litigants appearing pro se pre-dates the time when lawyers were licensed to appear for others and precludes the attempt herein to invest licensed attorneys with the monopoly of representation of plaintiffs in derivative suits on behalf of corporations owned by the plaintiffs.

As the Supreme Court recently observed in Faretta v. California, 95 S. Ct. 2525 (June 30, 1975); at 2534-2535:

> "At one time, every litigant was required to 'appear before the court in his own person and conduct his own cause in his own words.' 19/"
>
> "19/ (Citing Pollock & Maitland, History of English Law, Vol. 1 at 211)

This requirement has become a right embodied in our Judicial Code at 28 U. S. C. s 1654, which reads:

> "In all courts of the United States the parties may plead and conduct their own cases personally, or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

Rule 4 of the General Rules for the Southern District of New York specifically provides in subparagraph (b) for "A party appearing pro se..." N. Y. C. P. L. & R, Section 105(c) states:

> "Attorney. The word 'attorney' includes a person prosecuting or defending an action in person."

III.

POINT I OF ALLEGHANY'S BRIEF IS BASED ON THE MISCONCEPTION THAT MR. PHILLIPS IS "A LAYMAN" WHEN THE RECORD SHOWS HE IS "A PERSON LEARNED IN THE LAW" AND HAS WON $613,000 IN LEGAL FEES AND DAMAGES AND WON THE VOTES OF 23 MEMBERS OF THE JUDICIARY IN PROTECTING THE RIGHTS OF SMALL SECURITY HOLDERS AND THE PUBLIC INTEREST AND THUS HE IS "A LAWYER" AS DEFINED BY BLACK'S LAW DICTIONARY.

Plaintiff-appellee is concededly not a licensed lawyer. But it is not a license that makes a lawyer. It is being "learned in the law." Black's Law Dictionary p. 1033 (4th Ed.) A license merely authorizes the holder to be paid by any person for his legal services. Phillips, by comparison, can only be paid for legal services by order of the court or by a licensed attorney who retains him. A licensed attorney may only be admitted to the bar of the court on motion, a litigant pro se may act as his own lawyer without making a motion. But each, if he be "learned in the law" (Black's, supra) or "One versed in the law" (Shorter Oxford Dictionary) is a lawyer by definition.

The record here (1) of 23 members of the Judiciary of the United States voting to sustain Phillips' legal positions; (2) of his winning some $613,000 in legal fees and damages; and (3) of defeating such luminaries of the bar as then private attorneys Henry J. Friendly, Esq.

and Walter R. Mansfield, Esq.,* not to mention Abraham L. Pomerantz, the dean of the derivative suit bar; and (4) winning at least 5 cases in which Alleghany was a party; and (5) of forming The National Committee for Impeachment of Richard M. Nixon as President of the United States and of being the first person in the Nation to have called for impeachment on the basis of the Constitutional law - all these indisputed facts of record establish that "Mr. Phillips" is not "a layman" but '"One skilled in the law" and thus a lawyer.**

"Right now I may be the only person in the country who thinks President Nixon can be impeached," Mr. Phillips recently told a Congressman. The Congressman agreed." The New York Times, Sunday, June 4, 1972, Sec. 3, p. 6. ***

In originating the impeachment campaign, when licensed lawyers were laggard, Phillips educated the Nation on the Constitutional law. ***

* In Holt v. Kirby, 383 U.S. 902, Phillips moved for leave to file a brief amicus curiae. The Court granted the motion over the objection of Mansfield, who represented Kirby.

** LAWYER. One skilled in the law.
Any person who, for fee or reward, prosecutes or defends causes in courts of record or other judicial tribunals of the United States, or of any of the states, or whose business it is to give legal advice in relation to any cause or matter whatever. See ATTORNEY; BARRISTER; PROCTOR, SOLICITOR.
BOUVIER'S LAW DICTIONARY

*** The Nixon Administration unsuccessfullly sought to halt the campaign initiated by a two-page ad in The New York Times, of May 31, 1972. U.S.A. v. The National Committee for Impeachment, Randolph Phillips, Chairman, 469 F. 2d 1135 (2d Cir. 1972).

IV.

PLAINTIFF-APPELLEE PHILLIPS HAS A CONSTITUTIONAL RIGHT UNDER THE DUE PROCESS CLAUSE TO ACT AS HIS OWN COUNSEL IN HIS OWN DERIVATIVE SUIT, SINCE "THE FOUNDERS BELIEVED THAT SELF-REPRESENTATION WAS A BASIC RIGHT OF A FREE PEOPLE." Faretta v. California, U.S. (1975), 95 S.Ct. 2525, note 39.

In the words of Mr. Justice Stewart:

[39] The Founders believed that self-representation was a basic right of a free people. Underlying this belief was not only the anti-lawyer sentiment of the populace, but also the "natural law" thinking that characterized the Revolution's spokesmen. See P. Kauper, "The Higher Law and the Rights of Man in a Revolutionary Society," Lecture in American Enterprise Institute series on the American Revolution, Nov. 7, 1973, extracted in Univ. of Mich. Law Quadrangle Notes, Vol. 18, No. 2 (1974), at 9. For example, Thomas Paine, arguing in support of the 1776 Pennsylvania Declaration of Rights, said:

"Either party . . . has a natural right to plead his own cause: this right is consistent with safety, therefore it is retained: but the parties may not be able, . . . therefore the civil right of pleading by proxy, that is, by a council, is an appendage to the natural right [of self-representation] . . . ."

"Thomas Paine on a Bill of Rights, 1777," reprinted in Schwartz, *supra*, n. 37, at 316.

The recognition of the right of self-representation was not limited to the state lawmakers. As we have noted, § 35 of the Judiciary Act of 1789, signed one day before the Sixth Amendment was proposed, guaranteed in the federal courts the right of all parties "to plead and manage their own cause personally or by the assistance of . . . counsel." See 1 Stat. 92 (1789) as amended, 28 U. S. C. § 1654 (1970).

Although they fairly and adequately represented the 13 Colonies at the Constitutional Convention of 1787, 18 of the 38 Founding Fathers would be barred by Appellants' arguments as fair and adequate plaintiffs pro se because they were not members of the bar or licensed attorneys. *

Such "laymen" giants of the Convention as George Washington, Benjamin Franklin, Pierce Butler and Robert Morris would thus be disqualified to act as plaintiffs pro se in a derivative action under Alleghany's theory of Rule 23.1.

Approximately half of the 535 members of the House of Representatives who are not members of the bar or licensed attorneys but who write the laws of the Nation would be similarly disqualified by Alleghany's interpretation of Rule 23.1. **

Such a result could hardly have been intended by the drafters of Rule 23.1. The Constitutional history of the Republic repudiates the idea that "represent" as used in Rule 23.1 means "by licensed attorneys exclusively". Alleghany's construction is clearly unconstitutional.

---

* The professions and occupations of the Founding Fathers are set forth in The Story of the Constitution, published by the United States Constitution Sesquicentennial Commission, 1937.

** See The Congressional Directory.

"If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be denial of a hearing, and, therefore, of due process in the constitutional sense."
Powell v. Alabama, 287 U. S. 45, 69, quoted in Faretta, supra, at note 43.

Thus plainly a refusal to hear plaintiff Phillips because he has chosen to act as his own attorney in his own derivative suit would be a denial of due process in the Constitutional sense as well as a violation of Section 1654, whose origin dates back to the Administration of President Washington. Faretta, slip opinion, p. 7.

"In sum, there is no evidence that the Colonists and the Framers ever doubted the right of self-representation, or imagined that the right might be considered inferior to the right of assistance by counsel." Faretta, slip opinion, p. 26.

Thus plaintiffs pro se are Constitutionally the equal of licensed lawyers, and abilities vary within each category.

> *"In virtually every public opinion poll, lawyers are rated in last place in evaluation of integrity and credibility."*

Whitney N. Seymour, Jr., President, N. Y. Bar Assn, New York Law Journal, January 22, 1975

It ill behooves Appellants' lawyers in this era of Watergate to exalt their status above plaintiffs pro se. While it would be unfair to state that a profession of licensed attorneys standing "in last place" in the public's "evaluation of integrity and credibility" can not "fairly and adequately represent" shareholders, how unfair it is for members of that profession to sweepingly deny such right to plaintiffs pro se, no matter how qualified and whose integrity and credibility remain unimpaired.

V.

THERE IS NO MERIT TO ALLEGHANY'S CHARGES OF "CONFLICT OF INTEREST" AND OTHER ALLEGEDLY "DISQUALIFYING FACTORS". *

Because Phillips has applied to the district court for indemnification under Section 64 of the General Business Law of his expenses in successfully defending himself as a director of I. D. S. in the above-mentioned "fraud" suit, Alleghany contends a disqualifying "conflict of interest" exists between his role as plaintiff in the indemnification suit and as plaintiff. ** here.

Since the subject matter of the two actions is completely dissimilar it is impossible as a matter of law for a "conflict of interest" to exist. "Within the meaning of this Canon, a lawyer

---

* None of these attacks upon plaintiff Phillips' capacity to sue was pleaded, as required by Rule 9(a) of the federal rules. Thus these issues cannot properly be raised here. See Memorandum of Plaintiff-Appellee in support of motion to dismiss, pp. 1-3.

** "If there is a conflict of interest, the representation may well be deemed inadequate and the suit dismissed. Of course a purely hypothetical dispute will not necessitate dismissal. Defendant must show that a serious conflict exists and that plaintiff could not be expected to act in the interests of the other shareholders because doing so would harm his other interests.) (emphasis added)

7A C. Wright & A. Miller, s 1833 at 393-394.

represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."* As plaintiff pro se and as representative plaintiff Phillips has no "duty to contend for that which duty to another client requires him to oppose." He has no clients in opposite camps with respect to the same subject matter, and thus no "conflict of interest" is possible as a matter of law. The fact that I. D. S. is an adversary in one case and that in the second case he is bringing a derivative suit for the benefit of the parent company of I. D. S. hardly establishes a "conflict of interest."

Nor is there any substance to "The (professed) danger that Mr. Phillips' prosecution of this case will be influenced by his desire to achieve a favorable result in the (I. D. S. indemnification) litigation." Phillips' entire record as an Alleghany representative rebuts such a reprehensible charge, and Judge Ward quite properly rejected it as well as defendants' other attacks. Notwithstanding Alleghany's innuendoes that the present action might be used to further the indemnification action, there is no evidence to show that Phillips ever related the two and no statement or affidavit by counsel for I. D. S. or by any I. D. S. official to that effect. The conclusions that Alleghany seeks to

* Canons of Professional Ethics of the American Bar Association, No. 6. The courts have refused to recognize "hypothetical conflicts of interest in certain business dealings that have no obvious or demonstrated connection with the matter in suit." Globus, Inc. v. Jaroff, 266 F. Supp. 524 (1957) (S. D. N. Y.)

draw from the dates of filing of the complaint here and motions in the I. D. S. case and notices for discovery are purely malicious and unsupported by any evidence by any competent person that there was a "synchronization of the actions" for a sinister purpose. In stating that I. D. S. had moved for summary judgment to dismiss plaintiff's complaint 10 days before the filing of the complaint here - as if that filing were a reprisal - Alleghany omits to note that prior thereto Phillips had moved for summary judgment against IDS. Finally, since the I. D. S. case is sub judice Judge Tenney on the merits, it is not only improper for Alleghany to seek a judgment from this Court with respect thereto but it is obvious that Phillips would not have vigorously and successfully opposed defendants' motions to dismiss Counts I, III, and VII if he were simultaneously using this case to produce a benefit for himself in the I. D. S. case. Thus, the directly opposite situation exists here than in In re Value Line Special Situations Fund Litigation (1973-74 Transfer Binder) CCH Fed. Sec. L. Rep. par. 9[illegible], 601 (S. D. N. Y. 1974) cited by Alleghany and in which in Alleghany's own words the plaintiff was "willing to forego the prosecution of the derivative action in exchange for the discontinuance of a libel claim pending against him." (Alleghany brief, p. 21). There is not a scintilla of evidence here or in the 20 year litigating record of Phillips on behalf of Alleghany

that he would enter into or accept such a personal deal. In fact the record shows that when an officer of Alleghany attempted to bribe him in the prior derivative action, he rejected the bribe and testified to it in open court. Alleghany Corporation v. Kirby, 218 F. Supp. at 177. And caused the bribe to go into the settlement fund.

Sweet v. Bermingham, 65 F. R. D. 551 sets forth the appropriate criteria that justifies Phillips acting as plaintiff pro se and as representative plaintiff.

Judge Cannella stated in Sweet:

> While Stull v. Pool is distinguishable on its facts from the matter at bar,[6] we find that Judge Owen's decision to disqualify Mrs. Stull as representative plaintiff rests solely upon the existence of a wife-husband relationship between plaintiff and her counsel and the potential for economic abuse attendant thereto. 63 F.R.D. at 704 n. 3. The Judge found that on such facts fair and adequate representation could not be assured to potential class members. This is exactly the position advanced by the defendants on this motion—Mrs. Sweet is allegedly dissimilar from all other shareholders because of her interest in her husband's potential legal fees. We decline to adopt such a view in this case. Whatever vitality the proposition adopted in Stull v. Pool may have in the class action context, this Court finds the rule to be unduly restrictive under the Rule 23.1 analysis suggested above. *See*, pp. 554–555 *supra*.
>
> [4] It is axiomatic that a derivative action cannot "be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders" (Fed.R.Civ.P. 23.1; *see, e. g.*, Papilsky v. Berndt, 466 F.2d 251, 258–260, (2 Cir.), cert. denied, 409 U.S. 1077, 93 S.Ct. 689, 34 L.Ed.2d 665 (1972)) and also that any award of attorneys fees which might arise from such litigation will be made only after close judicial supervision and only with the Court's approval. Civil Rule 11B, S.D.N.Y.; 7A C. Wright & A. Miller, *supra* § 1841 at 447–50; *cf.*, City of Detroit v. Grinnell Corp., 495 F.2d 448, 468–474 (2 Cir. 1974) (standards governing the fixing of counsel fees). Thus, the shareholders of Columbia Ventures, Inc. are adequately protected by the Court against any of the detriments alleged by the defendants as possibly flowing from the marital re-

lationship between plaintiff and her counsel; no counsel fee can be paid and no derivative action can be terminated unless the Court, on notice to all shareholders, first finds that the fee or settlement is fair, equitable and reasonable and this, of course, will be done without regard to plaintiff's marital interests. *See, e. g.*, Greenspun v. Bogan, 492 F.2d 375, 378 (1 Cir. 1974); Levin v. Mississippi River Corp., 59 F.R.D. 353 (S.D. N.Y.), aff'd, 486 F.2d 1398 (2 Cir.), cert. denied, 414 U.S. 1112, 94 S.Ct. 843, 38 L.Ed.2d 739 (1973); 7A C. Wright & A. Miller, *supra* § 1839 at 429–435 and § 1841 at 447–50.

The simple fact that Mrs. Sweet is the wife of an attorney in the firm which represents her is, in the opinion of this Court, insufficient ground upon which to dismiss this action and cause another shareholder to commence it anew. The defendants have made absolutely no showing that Mrs. Sweet's interests are so antagonistic to those of other shareholders that she cannot fairly and adequately represent their interests. They have made no showing that this lawsuit will not be vigorously prosecuted by competent counsel. Nor do we find the existence of the marital relationship between plaintiff and her counsel to be a conflict of interest *per se*. Thus, as Judge Bryan aptly pointed out in Stull v. Baker [1973 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 94, 227 at 94, 929 (S.D. N.Y.1973), wherein the plaintiff was "the uncle and law partner of his attorney,"

> while I view with disfavor the law partner relationship between the plaintiff Stull and his attorney in the context of this case, I cannot go so far as to say that plaintiff Stull will not fairly and adequately protect the interests of the class. He shares a common interest with its members. Moreover, it cannot be said that plaintiff's attorney is unqualified to conduct this litigation. It is quite plain that this is not a collusive suit.

Cf., Polak v. Noel Industries, Inc., 64 F. R.D. 333 (S.D.N.Y.1974).

While the practice of bringing lawsuits by relatives of the attorneys who will prosecute the claim is neither approved of nor encouraged by the judiciary, the Court now holds that, in the absence of any out-of-the-ordinary circumstances (the other challenges to Mrs. Sweet's representation in this derivative action cannot be said to be out-of-the-ordinary, *see, Surowitz, supra*), a derivative action so commenced should not be dismissed. That plaintiff's husband is a member of the law firm which represents her, when such firm is otherwise competent and qualified to prosecute the claim, is not perceived as an absolute bar to the action and cannot be viewed as creating a conflict of interest of so all) as to require the disqualification of the plaintiff and the dismissal of this lawsuit. The underlying fact that the plaintiff might derive some economic benefit, not available to other shareholders, from any attorneys fees which might ultimately be awarded in this action, when considered in light of the legal safeguards which attach to the determination of such fees, does not persuade the Court in defendants' favor.

Accordingly and for the reasons hereinabove stated, the defendants' motion to dismiss the instant action is hereby denied in all respects.

It is so ordered.

65 F.R.D. at 534-555.

There is no merit to Alleghany's contention that "Mr. Phillips' (has an) Animus Towards Alleghany." (Brief, p. 23)

The fact that the individual officers and directors of Alleghany have been sued by Phillips for multimillion dollar recoveries on behalf of Alleghany and that Phillips was instrumental in obtaining $3,000,000 in cash and the return of the controlling stock in the $3 billion I. D. S. system of investment companies to Alleghany is a complete repudiation of the charge of animus against Alleghany. (this memorandum, pp. 3-4)

Thus the magnitude of this prior settlement illustrates that Phillips is not a "Mr. duPont (with) a desire to wage war with those who control UCC" so that "he would be less favorably disposed than other members of the class to any overtures of settlement." duPont v. Wyly, 61 F.R.D. at 622, cited by Alleghany at p. 24. But even if Phillips had an axe to grind, that would not disqualify him in this Court. As Judge Frank stated in Subin v. Goldsmith, 224 F. 2d at 767, "litigants with a personal axe to grind may serve a definitely useful purpose."

"Mr. Phillips' Other Disqualifying Factors" as cited by Alleghany (pp. 24-25) are fictitious.

That Phillips has 3 other pending litigations in different areas of the law against other defendants, including a public interest case

could not conceivably render "Mr. Phillips...on so many counts an unfit derivative plaintiff." No authority for this preposterous conclusion is cited.

Mr. Phillips has researched the facts and the law and then drafted and served the complaint. He has been frustrated in the taking of depositions so that he cannot move with the speed and vigor he would desire; but upon the first attack upon his pleadings by defendants' briefs and papers totaling hundreds of pages, he responded with his own briefs and papers and was successful in sustaining the validity of Counts I, III, and VII with their potential for recovering for Alleghany and thus its shareholders some $6 to $8 million. The present appeals alone stymy the further prosecution of this case, since depositions have been stayed pending determination of the appeals. What more could any plaintiff whether pro se or represented by an attorney-at-law with a license on his wall do?

VI.

APPELLANTS HAVE CITED NO EVIDENCE TO SHOW THAT PHILLIPS HAS NOT, IN THIS LITIGATION "FAIRLY AND ADEQUATELY REPRESENT(ED) THE INTERESTS OF THE SHAREHOLDERS" OF ALLEGHANY CORPORATION. Rule 23.1, F. Rules Civ. Procedure

Alleghany and the individual director defendants seek to have this action dismissed after Phillips has defeated their motions

to dismiss Counts I, III and VII ! Only two such Establishment law firms as the Cahill and Debevoise firms with their 200 or more attorneys could have such unprecedented arrogance. Their proposition is that Phillips, in defeating their motions for judgment on the pleadings in this $6 to $8 million lawsuit, did not "fairly and adequately" represent the shareholders of Alleghany! We submit this is a frivolous appeal, especially since 7 lawyers were on the briefs below against one plaintiff pro se.

VII.

THE ISSUES ON THESE APPEALS ARE MOOT

Defendants' attack on Phillips as plaintiff pro se and as a representative plaintiff were made before Judge Ward's decision denying their motions to dismiss Counts I, III, and VII of the amended complaint, as is clear from the fact that the attacks were "rejected" by Judge Ward in the same memorandum opinion that denied defendants' motions to dismiss these counts. (J. A. 208a). Not only did Phillips "fairly and adequately represent" the shareholders of Alleghany by discovering these causes of action with their potential for a $6 to $8 million recovery, but he has also done so by defeating after extensive briefing the motions to dismiss or for judgment on the pleadings. The situation is akin

to contending that a sprinter cannot fairly and adequately run the 100-yard dash in 10 seconds; once he has done so the contention is moot. Appellate courts do not decide moot issues.

VIII.

THIS COURT LACKS JURISDICTION OVER THESE APPEALS

On January 27, 1976 this Court denied appellee's motion to dismiss the appeals, without prejudice to renewal of the motion at the hearing on the merits. Appellee will renew the motion at the hearing.

CONCLUSION

The appeals should be dismissed for lack of jurisdiction or on the ground that the issues sought to be raised by Appellants were not properly raised in the Court below. Otherwise the ruling of the District Court herein appealed from should be affirmed.

Respectfully submitted by

RANDOLPH PHILLIPS
Plaintiff-Appellee Pro Se
30 East 72nd Street
New York, N. Y. 10021

June 1, 1976

Copy Recieved Cahill Gaden + Reindel
attorneys for Allegheny Cap
June 1, 1:00 PM

Copy Recieved

Debevoise, Plimpton, Lyons + Gates
attorneys for Kirby + Tobin
June 1, 1:00 PM